

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SAMUEL LEE ROSS, JR.,

Defendant-Appellant.

UNPUBLISHED

March 27, 2007

No. 268079

Wayne Circuit Court

LC No. 05-006054-01

Before: Zahra, P.J. and Bandstra and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit murder, MCL 750.83, assault with intent to do great bodily harm less than murder, MCL 750.84, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of 14 to 30 years for the assault with intent to commit murder conviction, 3 to 10 years for the assault with intent to do great bodily harm conviction, and 2 to 5 years for the felon-in-possession conviction, to be served consecutive to a ten-year term of imprisonment for felony-firearm (third offense) conviction. He appeals as of right. We affirm.

Defendant's convictions arise from a shooting incident outside the home of his brother, Gerald Ruffin. The assault victims were defendant's cousins, Reginald Woodward (Reginald) and James Woodward (James). Their testimony indicated that they went to a family barbeque at Ruffin's home on May 30, 2005. Reginald took a bus to the house with his grandson. James arrived with his girlfriend and their children in his car, which he parked on the street in front of Ruffin's home. Defendant's car was also parked on the street. While outside Ruffin's house, defendant interjected himself into an argument between James and Ruffin. James decided to gather up the children and his girlfriend in order to leave after defendant walked over to his car as if he was going to get something, but then turned around and said, "we all ain't even worth shooting." Defendant and James continued to argue while James waited for Reginald, who had asked James for a ride. During the argument, defendant took a gun out of the glove compartment of his car and shot James seven times. Reginald was shot three times and was also struck with the gun after he tried to take it from defendant. Defendant was gone when the police arrived at the scene. According to Detroit Police Investigator Philip Wassenaar, defendant gave a statement on May 31, 2005, in which he admitted shooting James and Reginald, but did not claim self-defense.

At trial, defendant claimed that he acted in self-defense. Defendant testified that he kept the gun in his car for protection because he was robbed in the past while working as a vehicle repair technician in Detroit, but knew that it was wrong to do so. Defendant admitted that he is a convicted felon, but claimed that he had stayed out of trouble after being released from prison. Defendant testified that he shot James because he knew that James was dangerous and he thought James was going to open the trunk of his car to get a gun to shoot him. He shot Reginald to stop him from trying to take his gun. Defendant thought that Reginald would shoot him if he took the gun.

Other evidence at trial included a certified document from the Department of Corrections indicating that defendant was incarcerated between 1980 and 1986 for three armed robbery convictions, a conviction for assault with intent to do great bodily harm less than murder, and some felony-firearm convictions. The prosecutor argued in closing argument that this document, along with defendant's own testimony, established the felon in possession of a firearm charge. Defense counsel also addressed the felon-in-possession charge in his closing argument, arguing that defendant's only mistake was that he did not apply to the county board to restore his right to possess a firearm because his prior felony was 25 years old. He asserted that defendant had changed, and that he acted in self-defense when shooting James and Reginald.

Defendant's sole claim on appeal is that he was denied the effective assistance of counsel because defense counsel did not seek a stipulation to prevent the jury from learning that he had more than one prior felony conviction or the nature of the convictions. Defendant contends that he was prejudiced by the disclosure of the nature of the prior convictions, because they involved crimes of violence and firearms similar to those for which he stood trial.

We note that this Court previously denied defendant's motion to remand for an evidentiary hearing regarding this claim, because it appeared that the claim could be effectively reviewed on the current record. We similarly find no persuasive reason for a remand. Limiting our review to the record, we find no basis for relief. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Defendant must further demonstrate a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *and* the attendant proceedings were fundamentally unfair or unreliable. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996) (emphasis in original). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). [*People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001)].

The documentary evidence in question was relevant to the prosecutor's claim that defendant's prior conviction for armed robbery or assault with intent to do great bodily harm

established a “specified felony” under MCL 750.224f(2).¹ Further, the trial court instructed the jury, following a bench conference requested by defense counsel, that defendant’s prior conviction could only be considered for the felon-in-possession charge.

We agree that defense counsel could have requested a stipulation to prevent the jury from hearing the nature and number of prior convictions. *People v Swint*, 225 Mich App 353, 378-379; 572 NW2d 666 (1997). But it is clear from the record that defense counsel was unwilling to make any stipulation regarding defendant’s prior convictions. Although the prosecutor proposed a stipulation before opening statements, defense counsel informed the trial court that he was opposed to a stipulation because “[d]efendant has the right to have the Prosecutor prove the case against him beyond a reasonable doubt.” Notwithstanding his refusal to agree to a stipulation, defense counsel conceded in his opening statement that defendant was a convicted felon:

Now Mr. Ross you’ll learn is no angel, [sic] Twenty-five years ago he was convicted of a serious offense. He’s a felon. He was convicted back in February of 2000, 1980, February of 1980. And the Prosecutor have [sic] told you he’s a felon. Well, yes, you’ll learn he’s a felon. Because 25 years ago, almost 26, he made a mistake. But that shouldn’t cloud your judgment in this case.

It is apparent from the record that defense counsel attempted to minimize defendant’s prior convictions by disclosing them to the jury and arguing from their age that defendant had made a mistake. By not stipulating to the fact that defendant had a conviction for a “specified felony,” defense counsel avoided suggesting to the jury that defendant was stipulating to a conviction for purposes of the felon-in-possession charge. Further, defense counsel avoided or reduced any speculation by the jury regarding the nature of defendant’s prior mistake by disclosing his prior crimes. And while the documentary evidence indicated that defendant had multiple convictions that involved assaultive conduct and firearms, there is nothing in the evidence to indicate that the prior convictions involved a family dispute. They were old convictions, which defense counsel could reasonably argue arose from a past mistake long ago that should not affect the jury’s assessment of defendant’s present claim that he shot his cousins in self-defense.

Examined under an objective standard of reasonableness, we are satisfied from the record that defendant cannot overcome the presumption that defense counsel’s action constituted sound

¹ MCL 750.224f(2) provides, in part, that a person convicted of a “specified felony” shall not possess, use, or transport a firearm until the expiration of five years after the person has served all terms of imprisonment for the violation and the person’s right to possess, use, or transport a firearm is restored under MCL 28.424. A “specified felony” includes, but is not limited to, a circumstance where, “[a]n element of that felony is the use, attempted use, or threatened use of physical force against the person or property of another, or that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.” MCL 750.224f(6)(i). A defendant has the burden of producing evidence that his right to possess a firearm was restored, but the ultimate burden of persuasion rests with the prosecution. *People v Perkins*, 473 Mich 626, 638-639; 703 NW2d 448 (2005).

strategy under the circumstances. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). But even if we were to find that defense counsel's performance was deficient, we would not reverse because the failure to agree to a stipulation did not cause prejudice. There is no reasonable probability that the jury would have reached a different result on any of the charges if defense counsel had agreed to make a stipulation. *Rodgers, supra* at 714. Indeed, the jury acquitted defendant of a higher charge of assault with intent to commit murder with respect to Reginald, and found him guilty of the lesser offense of assault with intent to do great bodily harm less than murder.

We affirm.

/s/ Brian K. Zahra
/s/ Richard A. Bandstra
/s/ Donald S. Owens